

FEDERAL RULES OF APPELLATE PROCEDURE 1

Rule 5. ~~Appeal by Permission Under 28 U.S.C.~~

~~§ 1292 (b)~~^{*}

1 ~~(a) *Petition for permission to appeal.*—~~ An appeal from
2 an interlocutory order containing the statement prescribed by
3 28 U.S.C. § 1292(b) may be sought by filing a petition for
4 permission to appeal with the clerk of the court of appeals
5 within 10 days after the entry of such order in the district
6 court with proof of service on all other parties to the action in
7 the district court. An order may be amended to include the
8 prescribed statement at any time, and permission to appeal
9 may be sought within 10 days after entry of the order as
10 amended.

11 ~~(b) *Content of petition; answer.*—~~ The petition shall
12 contain a statement of the facts necessary to an understanding

^{*} New matter is underlined; matter to be omitted is lined through. If approved, the proposed amendments would supersede the proposed amendments to Rules 5 and 5.1 that were published for comment in April 1996 as part of a comprehensive style revision of the Federal Rules of Appellate Procedure.

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13 ~~of the controlling question of law determined by the order of~~
14 ~~the district court, a statement of the question itself, and a~~
15 ~~statement of the reasons why a substantial basis exists for a~~
16 ~~difference of opinion on the question and why an immediate~~
17 ~~appeal may materially advance the termination of the~~
18 ~~litigation. The petition shall include or have annexed thereto~~
19 ~~a copy of the order from which appeal is sought and of any~~
20 ~~findings of fact, conclusions of law and opinion relating~~
21 ~~thereto. Within 7 days after service of the petition an adverse~~
22 ~~party may file an answer in opposition. The application and~~
23 ~~answer shall be submitted without oral argument unless~~
24 ~~otherwise ordered.~~

25 ~~—(c)—~~ ***Form of Papers; Number of Copies.*** ~~— All papers~~
26 ~~may be typewritten. An original and three copies must be~~
27 ~~filed unless the court requires the filing of a different number~~
28 ~~by local rule or by order in a particular case.~~

29 ~~—(d)—~~ ***Grant of permission; cost bond; filing of record.*** ~~—~~

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30 ~~Within 10 days after the entry of an order granting~~
31 ~~permission to appeal the appellant shall (1) pay to the clerk of~~
32 ~~the district court the fees established by statute and the docket~~
33 ~~fee prescribed by the Judicial Conference of the United States~~
34 ~~and (2) file a bond for costs if required pursuant to Rule 7.~~
35 ~~The clerk of the district court shall notify the clerk of the~~
36 ~~court of appeals of the payment of the fees. Upon receipt of~~
37 ~~such notice the clerk of the court of appeals shall enter the~~
38 ~~appeal upon the docket. The record shall be transmitted and~~
39 ~~filed in accordance with Rules 11 and 12(b). A notice of~~
40 ~~appeal need not be filed.~~

41 **~~Rule 5.1. Appeal by Permission Under 28~~**
42 **~~U.S.C. § 636(c)(5)~~**

43 ~~—(a) *Petition for Leave to Appeal, Answer or Cross*~~
44 ~~*Petition.*— An appeal from a district court judgment, entered~~
45 ~~after an appeal under 28 U.S.C. § 636(c)(4) to a district judge~~
46 ~~from a judgment entered upon direction of a magistrate judge~~

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47 ~~in a civil case, may be sought by filing a petition for leave to~~
48 ~~appeal. An appeal on petition for leave to appeal is not a~~
49 ~~matter of right, but its allowance is a matter of sound judicial~~
50 ~~discretion. The petition shall be filed with the clerk of the~~
51 ~~court of appeals within the time provided by Rule 4(a) for~~
52 ~~filing a notice of appeal, with proof of service on all parties~~
53 ~~to the action in the district court. A notice of appeal need not~~
54 ~~be filed. Within 14 days after service of the petition, a party~~
55 ~~may file an answer in opposition or a cross petition.~~

56 ~~—(b)—~~ ***Content of Petition; Answer.*** ~~— The petition for leave~~
57 ~~to appeal shall contain a statement of the facts necessary to an~~
58 ~~understanding of the questions to be presented by the appeal;~~
59 ~~a statement of those questions and of the relief sought; a~~
60 ~~statement of the reasons why in the opinion of the petitioner~~
61 ~~the appeal should be allowed; and a copy of the order, decree~~
62 ~~or judgment complained of and any opinion or memorandum~~
63 ~~relating thereto. The petition and answer shall be submitted~~

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64 to a panel of judges of the court of appeals without oral
65 argument unless otherwise ordered.

66 ~~(c)~~ ***Form of Papers; Number of Copies.***— All papers
67 may be typewritten. An original and three copies must be
68 filed unless the court requires the filing of a different number
69 by local rule or by order in a particular case.

70 ~~(d)~~ ***Allowance of the Appeal; Fees; Cost Bond; Filing of***
71 ***Record.***— Within 10 days after the entry of an order
72 granting the appeal, the appellant shall (1) pay to the clerk of
73 the district court the fees established by statute and the docket
74 fee prescribed by the Judicial Conference of the United States
75 and (2) file a bond for costs if required pursuant to Rule 7.
76 The clerk of the district court shall notify the clerk of the
77 court of appeals of the payment of the fees. Upon receipt of
78 such notice, the clerk of the court of appeals shall enter the
79 appeal upon the docket. The record shall be transmitted and
80 filed in accordance with Rules 11 and 12(b).

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81 **Rule 5. Appeal by Permission**

82 **(a) Petition for Permission to Appeal.**

83 (1) To request permission to appeal when an
84 appeal is within the court of appeals'
85 discretion, a party must file a petition for
86 permission to appeal. The petition must be
87 filed with the circuit clerk with proof of
88 service on all other parties to the district-court
89 action.

90 (2) The petition must be filed within the time
91 specified by the statute or rule authorizing the
92 appeal or, if no such time is specified, within
93 the time provided by Rule 4(a) for filing a
94 notice of appeal.

95 (3) If a party cannot petition for appeal unless the
96 district court first enters an order granting
97 permission to do so or stating that the

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98 necessary conditions are met, the district court
99 may amend its order to include the required
100 permission or statement. In that event, the
101 time to petition runs from entry of the
102 amended order.

103 **(b) Contents of the Petition; Answer or Cross-**
104 **Petition.**

105 (1) The petition must include the following:
106 (A) the facts necessary to understand the
107 question presented;
108 (B) the question itself;
109 (C) the relief sought;
110 (D) the reasons why, in the opinion of the
111 petitioner, the appeal should be
112 allowed — including reasons that the
113 appeal is within the grounds, if any,
114 established by the statute or rule

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115 claimed to authorize the appeal; and

116 (E) an attached copy of:

117 (i) the order, decree, or judgment

118 complained of and any related

119 opinion or memorandum, and

120 (ii) any order stating the district

121 court's permission to appeal or

122 finding that any necessary

123 conditions to appeal are met.

124 (2) A party may file an answer in opposition or a

125 cross-petition within 7 days after the petition

126 is served.

127 (3) The petition and answer will be submitted

128 without oral argument unless the court of

129 appeals orders otherwise.

130 (c) **Form of Papers; Number of Copies.** All papers

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131 must conform to Rule 32(a)(1).^{**} Three copies must
132 be filed with the original, unless the court requires a
133 different number by local rule or by order in a
134 particular case.

135 **(d) Grant of Permission; Fees; Cost Bond; Filing the**
136 **Record.**

137 (1) Within 10 days after the entry of the order
138 granting permission to appeal, the appellant
139 must:

140 (A) pay the district clerk all required fees;
141 and

142 (B) file a cost bond if required under Rule
143 7.

144 (2) A notice of appeal need not be filed but the
145 date when the order granting permission to

^{**} The citation refers to amendments to Rule 32 that were published for comment in April 1996 as part of a comprehensive revision of the Federal Rules of Appellate Procedure .

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146 appeal is entered serves as the date of the
147 notice of appeal for calculating time under
148 these rules.
149 (3) The district clerk must notify the circuit clerk
150 once the petitioner has paid the fees. Upon
151 receiving this notice, the circuit clerk must
152 enter the appeal on the docket. The record
153 must be forwarded and filed in accordance
154 with Rules 11 and 12(c).

Committee Note

In 1992 Congress added subsection (e) to 28 U.S.C. § 1292. Subsection (e) says that the Supreme Court has power to prescribe rules that "provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for" in section 1292. The amendment of Rule 5 was prompted by the possibility of new statutes or rules authorizing additional interlocutory appeals. Rather than add a separate rule governing each such appeal, the Committee believes it is preferable to amend Rule 5 so that it will govern all such appeals.

In addition Rule 5.1 has been largely repetitive of Rule 5 and the Committee believes that its provisions could also be subsumed into Rule 5. Although Rule 5.1 did not deal with an interlocutory

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appeal, the similarity to Rule 5 was based upon the fact that both rules governed discretionary appeals.

This new Rule 5 is intended to govern all discretionary appeals from district court orders, judgments, or decrees. At this time that includes interlocutory appeals under 28 U.S.C. § 1292(b), (c)(1), and (d)(1)& (2), and the discretionary appeal under 28 U.S.C. § 636(c) from a district-court judgment entered after an appeal from a judgment entered on direction of a magistrate judge in a civil case. If additional interlocutory appeals are authorized under § 1292(e), the new Rule is intended to govern them if the appeals require court of appeals permission.

Subdivision (a). Paragraph (a)(1) says that when granting an appeal is within a court of appeals' discretion, a party seeking to appeal must file a petition for permission to appeal. The time for filing provision states only that the petition must be filed within the time provided in the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

Section 1292(b), (c), and (d) provide that the petition must be filed within 10 days after entry of the order containing the statement prescribed in the statute. Existing Rule 5(a) provides that if a district court amends an order to contain the prescribed statement, the petition must be filed within 10 days after entry of the amended order. The new rule similarly says that if a party cannot petition without the district court's permission or statement that necessary circumstances are present, the district court may amend its order to include such a statement and the time to petition runs from entry of the amended order.

The provision that the Rule 4(a) time for filing a notice of appeal should apply if the statute or rule is silent about the filing time

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was drawn from existing Rule 5.1.

Subdivision (b). The changes made in the provisions in paragraph (b)(1) are intended only to broaden them sufficiently to make them appropriate for all discretionary appeals.

In paragraph (b)(2) a uniform time — 7 days — is established for filing an answer in opposition or a cross-petition. Seven days is the time for responding under existing Rule 5 and is an appropriate length of time when dealing with an interlocutory appeal. Although existing Rule 5.1 provides 14 days for responding, the Committee does not believe that the longer response time is necessary because an appeal under § 636(c)(5) is a second appeal and the party involved will have had sufficient time to develop a response or cross-petition.

Subdivision (c). Subdivision (c) is substantively unchanged.

Subdivision (d). Paragraph (d)(2) is amended to state that "the date when the order granting permission to appeal is entered serves as the date of the notice of appeal" for purposes of calculating time under the rules. That language simply clarifies existing practice.